1959, Ch. 113; 59-15-4(e) Utah Code Ann. 1953, 1961 Pocket Supp.). The tax is labeled an "excise tax" by the legislature and a "sales tax" by the Tax Commission (R. 0042 page 65 of Regulations, R. 0044) and the Utah Supreme Court (R. 0045).

Regardless of the label that may be given the tax, it is clear that there is here no "sale." Rather, the tax is imposed upon the gross amount which one railroad is reimbursed by another for its costs in rendering statutorily required repair services. The "Interchange Rules" of the Association of American Railroads, which govern the classification of and charges for repairs (R. 0022, 0043), prohibit the inclusion of any element of profit in the charges for repairs (Rule 101, p. 207 of the Rules, R. 0041). The receipts from car repairs are not revenue receipts but mere reimbursement of expenses incurred in fulfilling responsibilities imposed upon a common rail carrier by Federal statutes. All costs of repairing freight cars are required by the Classification of Accounts of the Interstate Commerce Commission to be included in "Operating Expenses — Maintenance of Equipment Account 314." Charges of other railroads against the taxpayer for repair of its cars are debited to this account. Consequently, this reimbursement received serves only to reduce charges to operating expenses and are never treated as income items.

This Court has previously warned that it is "the practical operation of a tax, actual or potential, rather than its descriptive label or formal character" which is determinitive. *Nippert* v. *City of Richmond*, 327 U. S. 416 at 424 n 9 (1946). The practical operation of this tax is to impose a direct burden on the very process of commerce. The repair services of the petitioner which have been taxed by the State of Utah are services which all railroads are required to perform under the Interstate Commerce Act, The Federal Safety Appliance Act, The Federal Power Brake Act, and

by regulations adopted or approved by the Interstate Commerce Commission.

Part I, Section 1 (10) (11) of the Interstate Commerce Act, 41 Stat. 476, 49 U. S. C. 1 (10) (11), places an absolute duty upon all carriers to provide safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service. The "Interchange Rules" (R. 0041) of the Association of American Railroads is published by the railroads pursuant to this statutory mandate. The rules are filed with the Interstate Commerce Commission pursuant to subparagraph (13) of Section 1 of the Interstate Commerce Act, 41 Stat. 477, 49 U. S. C. 1 (13). The Commission has jurisdiction over such rules and regulations. *St. Louis Southwestern Ry.* v. *State of Arkansas*, 217 U. S. 136 (1910); *Bangor & Aroostook R. R.* v. *American Railway Association, et al.*, 136 ICC 727 (1928). The complete control over railroad car repair functions vested by Congress in the Interstate Commerce Commission is illustrated by the Power or Train Brakes Safety Appliance Act of 1958, 72 Stat. 86, 45 U. S. C. 9. This act itself codified the rules of the Association of American Railroads for installation and repair for all power and train brakes. Thus it is seen that the repairs that are taxed by the State of Utah are repairs that are required by the Federal Government in the interest of the efficient and safe movement of interstate commerce.

Moreover, penalties are imposed by the Federal Safety Appliance Act, as amended, 71 Stat. 352, 45 U. S. C. 13, for the movement of defective cars without first making the necessary repairs. The strictness with which these requirements are applied by the courts is illustrated by *United States* v. *Denver & Rio Grande Western R. R.*, 175 F. Supp. 662 (D. C. Utah 1959), *appeal dismissed*, 274 F. 2d 828. A defective car was there delivered in interchange to petitioner's yard. Petitioner was held liable for the statutory pen-

alty for movement of the defective car within its own yard from a live track to a repair track for purpose of repairing the defective equipment.

It is clear that the repairs here involved are performed in and are a part of the very process of interstate commerce. Indeed, the Tax Commission found that the cars involved were "primarily engaged in the movement of interstate commerce" (R. 0043). The facts are that the cars received "in interchange are then in the course of an actual movement between points and places within the United States over Rio Grande and the lines of other railroads. The repairs involved in this case are made in the course of such movement" (R. 0024).

Yet, the Tax Commission concluded the tax is "upon a transaction, and the transaction in the present case is completed before it becomes part of interstate commerce" (R. 0044). The Utah Supreme Court also appears to have rested its decision on the suggestion that the repairs are made "while the cars and locomotives are temporarily out of interstate commerce service" (R. 0046). Such a conclusion fails to perceive that the transaction taxed is one of the most vital elements of the process of interstate transportation itself. In considering the burden imposed by this tax on the process of commerce we believe it essential to visualize the picture of railroad transportation in its national aspects. There are thousands of railroad cars which are in continuous movement in the transportation of property and persons in a vast network of rail transportation extending throughout the entire nation. This is a vital part of our great national transportation system, and is responsible for the movement of a large part of the commerce throughout the United States. To avoid the necessity of frequent transfer of freight that would result if cars of each railroad were confined to the lines of such railroad, the vast interchange system was developed. This interchange of cars

is a vital necessity in the free flow of rail commerce which we know today. But it also necessitated the development of a system whereby rail cars would be repaired while in the possession of foreign lines. The uniform interchange rules were adopted and became an essential part of our national system of rail transportation. The subject tax must be tested in the light of its effect upon this system.

Prior decisions of this Court have established the rule that if a break in interstate movement is for the purpose of convenience and safety in the course of the interstate movement and is necessarily incident to the method of transportation, a state tax cannot be imposed. *Champlain Realty Co.* v. *Town of Brattelboro*, 260 U. S. 366 (1922); *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95 (1929). Though these cases dealt with the question of taxation of the property involved in the movement, the principle established is even more applicable to the repair of the very means of interstate transportation.

Aside from the law that has been established as to when commerce stops and starts, the factual realities of interstate rail transportation demonstrate the error of the conclusion in this case that the tax is upon a transaction completed before it becomes a part of commerce. A moment of stoppage in the movement of commerce may always be found. Trains stop at stations, fuels and water are added en route, inspections are made, crews are changed, trains are stopped on sidings for passing purposes, cars are switched, classified and interchanged in yards. No movement of commerce flows without stoppage or interruption. So too of repairs en route. These are part of the continuous process of the movement of commerce. The repair of cars of a foreign line, accepted by a road in interchange, is an essential and integral part of the movement of that commerce, a part of its very process. The services performed in the repair of cars moving in that commerce are as essential as the services

of the crews engaged in the operation of the trains. Without such repairs the movement of such cars must come to an end.

Thus it is clear that the "transaction" taxed by the State of Utah here is the transaction of interstate commerce itself. It makes no difference that it occurred in Utah. The decisions of this Court have established that transactions which are integral parts of interstate commerce are not subject to taxation by the states. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954); *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U. S. 422 (1947); *Nippert* v. *City of Richmond*, 327 U. S. 416 (1946); *Freeman* v. *Hewit*, 329 U. S. 249 (1946).

In *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U. S. 422 at 433 (1947) it was said that earlier decisions allowing taxation of certain local incidents of commerce were distinguishable because in each there was a "definite separation between the taxable event and the commerce itself." It was there held that stevedoring could not be so separated from commerce. Neither can the repair of railroad cars here be separated from commerce.

In *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 at 166 (1954), where an occupation tax on the gathering of gas transported in interstate commerce was held invalid, this Court stated, "it is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." The repair of railroad cars in the course of movement through the various states of this nation cannot realistically be separated from the flow of commerce.

The opinion of the Utah court rests entirely upon prior decisions of that court. Only passing footnote reference is

made to the pronouncements of this Court. The decision is in conflict with the principles established by the opinions of this Court cited above, and the decision erroneously affirms a direct interference with and burden upon the very flow of interstate commerce.

2. Clearly the question presented is of importance to the operation of the great rail transportation system of this nation.

Union Pacific Railroad Company, Southern Pacific Company and The Ogden Union Railway and Depot Company, because of the "prime judicial importance" of the question and the "substantial economic effect" of the tax upon those railroads, petitioned for (R. 0049) and were granted (R. 0051) permission to file an amici curiae brief in support of Rio Grande's petition for rehearing before the Utah Supreme Court.

Application of Utah's tax to railroad repairs will likely be followed by other states. Typical of present statutes that could be applied to the instrumentalities of interstate commerce in this manner are the following: Louisiana Revised Statutes (1950) 47:301.(14)(e), 302C, 1 C. C. H. Louisiana State Tax Reporter par. 60-068, 60-101; Smith-Hurd Illinois Ann. Stat. (1954) 1959 Pocket Part Ch. 120, Secs. 440, 441; Revised Code of Washington 82.04.050, C. C. H. Washington State Tax Reporter par. 60-064, 68-573.

Because of the burden on commerce already imposed by the Utah tax and the probable impact of similar statutes in other states the question here presented is one of importance to the entire national system of railroads.

CONCLUSION

For the foregoing reasons, this petition for a writ of rtiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINIONS AND JUDGMENT BELOW

I. Decision of the State Tax Commission of Utah

BEFORE THE STATE TAX COMMISSION OF UTAH

No. 182

In the Matter of the Sales Tax Deficiency of the
DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

DECISION

The above matter came on regularly for hearing before a lawfully constituted quorum of the State Tax Commission of the state of Utah on the 14th day of April, 1960, upon petition and notice as required by law, the taxpayer having appeared by and through its counsel of record, Sid N. Cornwall, and the State Tax Commission appearing by and through its counsel, F. Burton Howard; and both parties having presented sworn testimony and documentary evidence in support of their respective positions and the parties having agreed on the basis of a stipulation of facts, and said stipulation of facts having been duly filed herein, and the State Tax Commission having reviewed the evidence, having heard evidence of law and being fully advised in the premises hereby makes the following

FINDINGS OF FACT

1. That the petitioner, Denver and Rio Grande Western Railroad Co. was at all times pertinent to the matters involved herein a corporation doing business within the state of Utah.

2. That Rio Grande is a common carrier of property in intrastate commerce within the state and in interstate commerce within and between points in the United States.

3. That in the transportation of such commerce, Rio Grande receives railroad cars of various kinds in interchange from other railroads and moves such cars over its lines with underload or as empty cars, said cars being primarily engaged in the movement of interstate commerce.

4. That the petitioner as a handling line within the state of Utah is responsible for repairs to those cars which result from its own fault, and foreign railroad lines are responsible for repairs resulting from ordinary wear and tear. The classification of car repairs into one category or another is set forth in detail in the "Interchange Rules" published and revised annually by the Association of American Railroads.

5. When chargeable repairs are made by petitioner the details of such repairs are sent by Rio Grande to the railroad which owns the car and the owning railroad then pays the bill to Rio Grande.

6. The State Tax Commission of the state of Utah has levied an assessment against the Denver and Rio Grande Western Railroad for sales tax on the amount charged by Rio Grande for repairs resulting from ordinary wear and tear to cars and locomotives of other railroads which are repaired by Rio Grande pursuant to said "Interchange Rules."

7. That petitioner contends that the imposition of the tax assessed by the Commission is a burden on interstate commerce prohibited by the Commerce Clause of the Federal Constitution.

From the foregoing findings of fact, the State Tax Commission of Utah makes the following

CONCLUSIONS OF LAW

1. That the taxpayer under the laws of Utah is responsible for the payment of sales tax on the amount charged by it for repairs to cars and locomotives of other railroads.

2. That a tax on such repairs is not a tax prohibited by the Commerce Clause as being a tax on interstate commerce.

3. That the Utah sales tax is a tax upon a transaction, and the transaction in the present case is completed before it becomes part of interstate commerce.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the deficiency assessed against the petitioner be and the same is hereby sustained for the taxable period.

Dated this 21st day of June, 1960.

II. Opinion of the Supreme Court of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 9312

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY
a corporation, *Plaintiff*

v.

THE STATE TAX COMMISSION OF UTAH, *Defendant*

WADE, Chief Justice:

Denver and Rio Grande Western Railroad Company petitions this court to review a State Tax Commission decision imposing sales tax liability on money paid to Denver and Rio Grande for repairing cars and locomotives of other rail-

roads used by Denver and Rio Grande as exchange equipment in interstate commerce. Only the repair of such equipment chargeable to the railroad which owns it is involved in this petition. This is called "owner line responsibility" and includes repairs resulting from ordinary wear as distinguished from "handling line responsibility" resulting from the fault of the handling line which repairs such cars without compensation from the owner line. The facts are not disputed and most of them are stipulated.

Chapter 113, Laws of Utah for 1959, amends Section 59-15-4, U.C.A. 1953 by adding subsection (e) so that it contains the following:[1]

> "From and after the effective date of this act there is levied and there shall be collected and paid:
>
> • • •
>
> "(e) A tax equivalent to 2% of the amount paid or charged for all services for repairs or renovations of tangible personal property, or for installation of tangible personal property rendered in connection with other tangible personal property."

Rio Grande contends that the imposition of such tax is prohibited by Article I, Section 8 of the United States Constitution, giving Congress the power to "regulate commerce . . . among the several states" claiming (a) it is a direct imposition on interstate commerce and (b) it interferes with acts of Congress occupying the field of regulating interstate commerce. Judgment affirmed. We will discuss the foregoing contentions jointly.

The above cited provisions of the United States Constitution vest in Congress the power to regulate interstate commerce and since Congress has occupied that field, a state may not unduly burden such operation with taxes.[2] Just

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[1] See 1959 Pocket Supplement to Volume 6 U.C.A 1953, Section 59-15-4.

[2] See Cahill, State Taxation of Interstate Commerce, 27 Ore. L. Rev. 97, 98 (1948).

what taxes constitute a forbidden tax burden often presents a complicated and hard-to-determine question. The sales tax and its alternative or counterpart, the use tax, have been questioned in this state a number of times. In at least two cases we have held the use tax uncollectible for violation of the interstate commerce provisions of the Constitution.[3]

In the Southern Pacific case[4] we held invalid a use tax levied on food furnished without charge by the railroad and consumed within this state by its employees who operated the dining car services on trains passing through this state. We refused to uphold this use tax levy because we found no taxable event of this food when it was not being used in furtherance of interstate commerce. There the state made no claim of a sale by the railroad of this food to the consuming employees. So we did not determine that question.

In the Union Pacific case[5] we again held invalid a use tax assessed on the purchase price of diesel engines which were first used in Nebraska then driven to Salt Lake City, and after inspection for fuel and repairs were used in interstate commerce here. We there rejected the state's contention that the inspection of the locomotive after its arriwal here, and before using it in interstate commerce, constituted a withdrawal from interstate commerce, thereby creating a taxable event here before return to interstate commerce. There the state relied on a line of cases holding that a taxable event had occurred wherein the facts are not readily distinguishable from the situation there presented.[6] How-

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[3] Southern Pacific Company v. Utah State Tax Commission, 106 Utah 451, 150 P. 2d 110; Union Pacific Railroad Company v. Utah State Tax Commission, 110 Utah 99, 169 P. 2d 804.

[4] See note 3, supra.

[5] See note 3, supra.

[6] See Henneford v. Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814; Southern Pacific Co. v. Gallagher, 306 U. S. 167, 59 S. Ct. 389, 86 L. Ed. 586; Pacific T. & T. Co. v. Gallagher, 306 U. S. 182, 59 S. Ct. 396, 83 L. Ed. 595; Cloverdale v. Pipe Line Co., 303 U. S. 604, 58 S. Ct. 736, 82 L. Ed. 1043; Nashville C. & S. L. Ry Co. v. Wallace, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730.

ever, there is no difficulty in distinguishing the facts in that case from the facts in the present case. There this state levied a use tax on the full purchase price of the diesel locomotives which were first used in Nebraska then driven to Utah, claiming that an inspection for repair and fuel before actual use in interstate commerce here constituted a taxable event. Here a sales tax is levied not on the purchase price of the cars and locomotives repaired, but on the money paid to the Rio Grande for materials furnished and services rendered in making such repairs while the cars and locomotives are temporarily out of interstate commerce service while the repairs are made within this state.

Rio Grande voluntarily paid and concedes liability for a use tax on the material used in making these repairs. So the dispute is limited to whether our statute creates a valid sales tax liability for the services rendered in making such repairs by Rio Grande and paid for by the owner line. Rio Grande only claims that this tax violates the commerce clause of the federal Constitution by creating an unreasonable burden on interstate commerce with no taxable event in this state. It does not claim that our statute is invalid because the tax is technically on services and not on a sale of property and such a contention would be without merit if made. Thus it is not apparent why the materials furnished in making the repairs could be taxable but the services rendered in making such repairs would not be taxable. The same taxable event occurs in this state in connection with the repair services rendered as with the materials furnished. The cars and locomotives are temporarily taken out of service while the repairs are made, and in so doing the materials are used and all this is accomplished in this state through the Rio Grande and paid for by the owner lines, and the burden on interstate commerce is the same on each item.

In the Union Stock Yards case[7] we upheld a sales tax on hay, grain and straw fed by the Union Stock Yards to livestock after such livestock were taken off the train for feeding and rest purposes while in transit through this state in interstate commerce. We there held that there was a taxable event in this state on a transaction occurring in this state between the interstate movements of the livestock before and after the taking off the trains for feeding and rest. We conclude that the rule therein followed is equally applicable to the facts in the present case and affirm the Tax Commission's ruling.

No costs allowed.

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[7] Union Stock Yards v. State Tax Commission, 93 Utah 174, 71 P. 2d 542.

III. Judgment of the Supreme Court of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

Regular October Term, 1960

January 13, 1961

No. 9312

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY a corporation, *Plaintiff*,

v.

THE STATE TAX COMMISSION OF UTAH, *Defendant*

Judgment

This cause having been heretofore argued and submitted and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the order of the Tax Commission be, and the same is, affirmed. No costs awarded.

Issued April 13, 1961